(26)

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 88.

MRS. LESLIE F. SLADE ET AL.,
PETITIONERS,

VS.

SHELL OIL COMPANY, INC., ET AL.,
RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI.

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May It Please the Court:

Respondents respectfully submit that this Court should not entertain the petition for the issuance of writ of certiorari in this case for the following reasons:

I.

The petition and supporting brief do not contain a direct and concise statement with appropriate page references to the printed record as required by Rule 27, Paragraphs 2(d) and 3, and Rule 38, Paragraph 2, of the Rules of this Court.

II.

The Louisiana Rule was correctly announced and applied to the facts in this case by the Circuit Court of Appeals.

III.

Petitioners have not been denied any right under Rule 8 of the Federal Rules of Civil Procedure as alleged under specification number 4.

IV.

Specification number 5 is not well taken for the reasons that:

(1) There is no conflict between the Louisiana Law and the Interstate Commerce Commission Safety Rules.

(2) The Motor Carrier Act of Congress does not prevent the application of salutary local provisions to promote safety of motor traffic.

V.

Petitioners merely ask this Court to review the evidence or inferences drawn from it, which does not warrant the granting of the writ.

VI.

This Court need not examine the grounds on which the Circuit Court of Appeals has placed correct decision.

Errors in Petitioners' Statement of Case.

In most instances petitioners have neglected to give page references to the printed record in support of the facts stated. This in itself is sufficient ground for denial of the writ. *United States* v. *Rimer*, 220 U. S. 547; *Furness, Withy & Co.* v. *Yang Tsze Insurance Assn.*, 242 U. S. 430; *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440; *Layne &*

Bowler Corporation v. *Western Well Works*, 261 U. S. 387, 393; *Mangum Import Co.* v. *Coty*, 262 U. S. 159, 163; *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508.

Petitioners have inadvertently made certain statements in various parts of their petition and brief which we submit are erroneous, or might lead to erroneous conclusions.

(1) The fog is referred to as artificial and as "defendant's fog," which might imply that the fog was entirely artificial, subject to defendant's control and with characteristics distinct from that of a natural fog.

The evidence shows without dispute that the existence of the fog depended upon the following: (a) sufficient hydroscopic particles in the air to form nuclei (R. 305, 339, 367, 422); (b) temperature inversion (R. 242, 308, 384, 422); (c) relative humidity of 100% (R. 306, 340, 373, 722); (d) wind of not less than two miles an hour and not more than six miles an hour (R. 242, 339, 385, 422); (e) favorable topography (R. 313, 340, 422); (f) delicate balance between the temperature of the surface and the air (R. 282, 311, 385, 342.

Many pages of the record are consumed with expert testimony on the question of whether the fog was caused entirely by general weather conditions, or whether the oil company's "hot water ditch" contributed to the fog by increasing the rate of evaporation of the water in the ditch (R. 325-347, 358-387, 398-405, 421-448).

Natural conditions favorable for fog formation existed in the area where the accident occurred (R. 417). On the night and early morning preceding the accident, a general fog extended over the entire area around Norco, Louisiana, beginning seven miles west of Norco at Laplace, Louisiana, and extending as far east as Kenner, Louisiana, a distance of approximately 17 miles (R. 481-482). There were no visible characteristics distinguishing this fog from

any other fog which frequently occurs in numerous places in Southeastern Louisiana (R. 480, 483).

(2) Petitioners state "the fog was a cause—not a condition" (petition 2), and also state in numerous places in the petition and brief that the fog was caused by the wrongful or negligent acts of the Oil Company. The sufficiency of the plaintiff's evidence on both questions was challenged on appeal, and the Circuit Court of Appeals reserved a decision on each question as being unnecessary as Slade's contributory negligence defeated recovery (R. 603).

(3) The poem relied upon (petition 2) does not appear in the record, and we submit is no proof of the frequent existence of "steam made" fogs.

(4) The record fails to show that the "chicken truck" had lost its way. On the contrary, it shows that the driver of this truck had stopped temporarily for the purpose of adjusting his windshield wiper (R. 43).

(5) Petitioners' statement on Page 3 might indicate that Slade was killed immediately upon entering the heavy fog. The record shows that Slade had driven several hundred feet in the thin fog, the distance from the foot of the Spillway levee where the thin fog was first encountered to the scene of the accident being approximately one-half of a mile (R. 88), and that, after striking the thick fog, Slade traveled approximately fifty feet on the pavement and then swerved off the pavement and ran forty-six feet on the shoulder of the highway before striking Greer's truck (R. 92). Petitioners refer to Page 182 of the record as indicating that Slade had not traveled a sufficient distance on the shoulder to clear the pavement of his truck and trailer. Mr. Arnold's testimony does not in any wise dispute the distance that Slade traveled into the thick fog before the collision, but merely insists that the right side of the truck and trailer was off on the shoulder and that the left wheels thereof had not left the pavement (See cross-examination of same witness, R. 202).

(6) Petitioners make a statement on Page 27 of the brief implying that certain changes may have taken place between the time of the accident and the time when the photographs were taken. No reference is made to the record to support such statement, and we have been unable to find any evidence to sustain the statement.

Statement of Case.

Judge Hutcheson, in rendering the opinion of the Circuit Court, very clearly and accurately set forth the controlling facts (R. 599-603). We would merely call attention to the court's statement of the facts, except for the elaboration thereon contained in the petition and argument.

Plaintiff intestate, Leslie F. Slade, was a young man twenty-seven years of age and in perfect physical condition (R. 39, 70). He had approximately ten years experience as a truck driver, the greater part of which was in driving from Jackson, Mississippi, to and from New Orleans, Louisiana, and had the reputation of being one of the best and one of the fastest drivers in the employment of Gordon Transports, Inc., a common carrier of freight for hire by motor vehicle (R. 106). Shell Oil Company, Inc., defendant in the district court, had operated an oil refinery at Norco, Louisiana, since 1919. This plant was situated on the north bank of the Mississippi River approximately twenty-two miles west of New Orleans (measured along the Airline Highway). The area around Norco consisted of low marshy swamp lands, largely surrounded by bodies of water. The Mississippi River was on the south, the City of New Orleans and the Gulf of Mexico on the east, Lake Pontchartrain and Lake Maurepas on the north and the Bonne Carre Spillway on the west, connecting the Mississippi River with Lake Pontchartrain. The Oil Company's business of refining crude oil into commercial products was carried on by a process of distillation and condensation, requiring the ar-

tificial heating and cooling of such products (R. 125-128). This process requires the use of approximately seven thousand gallons of water per minute, which water passes from the Oil Company's plant into an underground pipe approximately 2,800 feet long, at which point the same was discharged into an open ditch. The temperature of the water at the point where the same was discharged into the open ditch was approximately 110 degrees Fahrenheit (R. 128). Prior to the construction of the Airline Highway, this water, discharged from the Oil Company's refinery, followed the natural course of drainage and in a northerly direction into Bayou Trepagnier, thence into Bayou La Branche from whence it flows into Lake Pontchartrain at a point approximately five miles north of the refinery (R. 139).

About 1928 or 1929 the Louisiana State Highway Commission surveyed the highway from Baton Rouge to New Orleans, known as the Airline Highway. The highway passed through the swamps from Norco to New Orleans, Louisiana (R. 468). On October 30, 1930, the Oil Company donated a right of way through its property to the State of Louisiana (R. 136-139). A foundation for the highway was constructed by dredging a canal sixty feet wide through the swamps so as to provide earth upon which to build a roadway (R. 454-455). Construction of this canal diverted the natural course of the drainage from the Oil Company's property from its former course in a northerly direction into Lake Pontchartrain into the highway canal, running in an easterly and westerly direction (R. 456). About 1934 a highway was constructed along the earth embankment provided by dredging the canal. The Airline Highway crossed the Oil Company's water disposal ditch at a point approximately 1,400 feet from where the water was discharged into said ditch (R. 453). The bottom of the canal at this point was below sea level and it was not possible to prevent the course of said drainage from being diverted into and along the highway canal.

On March 4, 1940, Leslie F. Slade left Jackson, Mississippi, on a trip to New Orleans, Louisiana, driving a combination tractor and semi-trailer, commonly known as a "truck," being the usual type of motor carrier equipment observed on the highways. The motor power was furnished by a four-wheel tractor weighing 5,400 pounds to the rear of which was attached a trailer, the front end of which rested upon a "fifth wheel" attached to the rear of the tractor, and the rear of the trailer was supported by two wheels thereunder. The trailer was approximately 10 feet high and 6 feet wide and weighed 7,200 pounds when empty, and on this occasion carried a load of about 9,000 pounds. The truck was painted yellow. The tractor was manufactured by the International Harvester Company and the trailer by the Carter Trailer Company, both being standard equipment. The tractor was equipped with hydraulic brakes and the trailer with vacuum brakes, resulting in efficient braking equipment for the six wheels of the combination. The equipment was mechanically in perfect condition and met the requirements of the Interstate Commerce Commission to the effect that when being driven at 20 miles per hour the combination trailer and tractor could be stopped within a distance of 30 feet (R. 70, 74, 76 and 103), and, when driven at a speed of five miles per hour, the equipment described above could be stopped in a distance of five feet or less (R. 96).

Franklin Ford Greer was also employed by Gordon Transports, Inc., and on the same occasion was driving similar equipment over the same route. A light fog was encountered at Manchac Pass over Lake Maurepas (R. 86). Near Laplace, Louisiana, both truck drivers again stopped and checked their trucks. This occurred around 7:00 A. M., at which time both of the drivers were one hour late on their schedule to New Orleans (R. 86-87).

The Bonne Carre Spillway is situated about five miles east of Laplace, Louisiana, and just west of Norco, Louisi-

ana. At this point the highway follows the top of the Mississippi River Levee across the Spillway and has an elevation of approximately 15 feet or 20 feet above the surrounding territory which consists of a low, level, marshy swamp, grown up in willow and cypress trees (R. 70). As a driver comes off the east end of the Spillway elevation, the highway is straight for a distance of approximately three miles and on a clear day the vision is unobscured for that distance. On the east end of the Spillway Bridge it is approximately one-tenth of a mile from the top of the levee to the foot of the Spillway elevation. It is approximately five-tenths of a mile from the foot of the Spillway elevation to the side road on the south side of the New Orleans Highway, which side road leads through a gateway in a southerly direction to the Shell Oil Company Refinery at Norco, Louisiana. The collision occurred on the highway at a point opposite the Shell Oil Company gateway (R. 88). At the time of the accident the road bed of the main highway had been constructed for sufficient width to provide for a four-lane highway, being approximately 56 feet wide. The paved portion of the highway, however, was only 19 feet 10 inches in width with a dirt shoulder of approximately 6 feet 6 inches on the north side of the highway and a dirt shoulder approximately 29 feet 8 inches in width on the south side of the highway. The dirt shoulder was not prepared for travel (R. 44).

As Greer drove down the incline on the east end of the Spillway, he observed in his rear view mirror Slade following him at a distance of approximately 200 or 250 yards to the rear. Both drivers were then proceeding at a speed of approximately 35 miles per hour (R. 88-89). As Greer encountered the thin fog near the foot of the Spillway he began to slow down and blinked his lights so as to warn Slade to be cautious (R. 93). Greer stressed the fact that Slade was in a more advantageous position than he was due to the fact that Slade not only was warned

by the blinking of his lights but could gauge the visibility by seeing Greer's truck disappear into the fog.

Greer drove through the thin fog for a distance of several hundred feet (R. 88), whereupon he encountered a very thick, heavy fog and, after driving about fifty feet in the thick fog, he suddenly noticed a "chicken truck" parked in front of him in his lane of traffic. He swerved off the pavement at something like a forty-five degree angle (R. 94) and continued to travel on the shoulder of the road when he almost encountered a truck belonging to the Louisiana and Arkansas Railway Company, driven by a Mr. Arnold, proceeding slowly along the shoulder of the road in a westerly direction. Greer again attempted to make a short turn to avoid Arnold's truck and thereby overturned the truck he was driving on the shoulder of the highway (R. 53-54).

Slade followed Greer's course, dodged the automobile commonly referred to as the "chicken truck," temporarily stopped on the pavement and located about 50 feet inside the thick fog, drove off onto the shoulder of the road, and, after driving 46 feet thereon, struck Greer's overturned truck with a terrific impact, shearing the steel "king pin," approximately three inches in diameter, releasing the trailer to his truck, which plowed forward into the cab, mashing the same like crumpling paper with your hands, and causing Slade's death (R. 95). The evidence and also the pleadings show without dispute that "the vision of the said Slade was wholly obscured on said occasion by said dense and heavy fog and cloud and in such fog or cloud he was unable to * * * stop said truck in sufficient time to avoid a collision" (R. 7).

Both Greer and Arnold testified that Slade made no effort to apply his brakes (R. 95, 96, 198).

The record completely sustains the statements of fact and the conclusions as set forth in the Circuit Court of Appeals by Judge Hutcheson.

Louisiana Rule Was Correctly Announced and Applied to the Facts in This Case by the Circuit Court of Appeals.

Judge Hutcheson, in rendering the opinion of the Circuit Court of Appeals, states the Louisiana rule as follows (R. 603):

> "It is settled law in Louisiana that one entering a fog, such as the one pleaded and testified to here, must stop until sure of his way, or, if he drives into it, he must proceed at such a speed as that he can stop the car in the distance within which he can see objects in his way."

That such is the rule in Louisiana not only as to a fog, but as to any obstruction to the view upon a highway is well settled by the following cases:

When vision was obscured by fog: *O'Rourke* v. *McConaughey*, 157 So. 598; *Raziano* v. *Trauth*, 15 La. App. 650, 131 So. 212; *Penton* v. *Fisher*, (La. App.) 155 So. 135; *King* v. *Jamstremski*, (1927) 6 La. App. 335, 73 A. L. R. 1026; *Lapeze* v. *O'Keefe*, (C. A. A.) 158 So. 36; *Hutchinson* v. *T. L. James & Co.*, 160 So. 447; *Rector* v. *Allied Van Lines*, (La. App.) 198 So. 516; *F. Strauss & Son, Inc.*, v. *Childers*, (La. App.) 147 So. 536.

When vision was obscured by dust: *Castille* v. *Richard*, 157 La. 274, 102 So. 398; 37 A. L. R. 586.

When vision was obscured by smoke: *Dominick* v. *Haynes Bros.*, 127 So. 31; *Camel* v. *Texas & Pacific Railway Co.*, (La. App.) 182 So. 339.

When vision was obscured by blinding headlights: *Pepper* v. *Walsworth*, 6 La. App. 610; *Woodley & Collins* v. *Schusters' Wholesale, Inc.*, 12 La. App. 467, 124 So. 559; (La. S. Ct.) 170 La. 527, 128 So. 469; *Safety Tire Service, Inc.*, v. *Murov*, 19 La. App. 663, 140 So. 879; *Mansur* v. *Abraham*, (La. App.) 164 So. 418; *Maggio* v. *Bradford Motor Express, Inc.*, (La. App.) 171 So. 859; *Harper* v. *Holmes*, (La. App.) 189 So. 463.

When vision was obscured by curve or turn in the road: *Arbo* v. *Schulze,* (La. App.) 173 So. 560; *Rosso* v. *Aucion,* 7 So. 2d 744.

When vision was obscured by heavy rain or mist: *Mouton* v. *Talbot & Son,* (La. App.) 161 So. 899; *Becker* v. *Mattel,* (La. App.) 165 So. 474; *Penton* v. *Sears, Roebuck & Co.,* (La. App.) 4 So. 2d 547.

When vision was obscured by extreme darkness: *Louisiana Power & Light Co.* v. *Saia,* (La. App.) 173 So. 537; (La. S. Ct.) 177 So. 238; *Pollet* v. *Robinson Lumber Co.,* (La. App.) 123 So. 155.

Petitioners seek to avoid the effect of this well settled Louisiana law by urging that the Louisiana rule was changed in the case of *Gaiennie* v. *Cooperative Produce Co.,* 199 So. 377, decided by the Supreme Court of Louisiana on November 4, 1940. This case is considered of sufficient importance by petitioners that they set the same out in full as Appendix B to the petition and brief, same appearing in said appendix to the petition on pages 45-51, inclusive.

This case does not change the well established Louisiana rule as recognized and followed by the Circuit Court of Appeals in the present case, but merely recognizes a long existing and well established exception to the rule. This should be clear from the statement of Judge Ponder in the Gaiennie case in the following language:

> "While the general rule makes it the duty of the driver of an automobile to maintain a speed sufficiently slow and to have such control of his car that he can stop within the distance in which he can plainly see an obstruction or danger ahead, yet it has been well recognized that this rule has exceptions and modifications. *Jacobs* v. *Jacobs,* 141 La. 272, 74 So. 992, L. R. A. 1917F, 253."

The exception recognized in said case is merely an application of the "sudden emergency doctrine" to the general rule set forth above. In a case where a driver has

no reason to anticipate the presence of an obstruction and is free of negligence contributing to the emergency, the exception applies, and under such circumstances a driver is relieved of contributory negligence.

This rule was not first established in the Gaiennie case; on the contrary, the leading case in Louisiana on the question of this exception to the general rule is that of *Jacobs* v. *Jacobs,* 141 La. 272, 74 So. 992, L. R. A. 1917F, 253, which was decided on March 12, 1917, more than twenty-five years ago, and has been followed by a long line of authorities.

While counsel for the petitioners wholly fail to call attention to the Gaiennie case in the Circuit Court, either in their original brief or in their petition for rehearing, they did in their original brief cite a long line of authorities on the question of the application of the emergency doctrine, which authorities are set forth and quoted from in appellee's brief before the Circuit Court of Appeals on pages 43-62, inclusive. In the reply brief of appellant before the Circuit Court of Appeals, it was definitely pointed out that such cases were not applicable because each and all of the cases excusing a driver from contributory negligence were based upon the condition that the obstruction in the highway be unexpected and such as the driver was not required to anticipate and that the driver be guilty of no negligence contributing to the emergency.

The law in Louisiana both as to the general rule and as to the exception thereto is so well established that there should be no difficulty in announcing either the general rule or the exception thereto. Difficulty, however, does arise in applying the rule and the exception thereto to the varying and complicated facts in cases before the court for decision.

In the Gaiennie case the circumstances were such that the driver had no reason to anticipate the presence of an obstruction upon the highway and exercised due care under the circumstances which existed, and was not guilty of any negligence which contributed to the emergency.

The court, after full consideration of the facts in that case, decided that such facts came within the exception to the rule, instead of within the general rule.

In order to bring the present case within the exception to the rule, it would be necessary for the facts to show that Slade had no reason to anticipate an obstruction upon the shoulder of the highway. It is well settled law in Louisiana not only that a person stop when encountering a fog obstructing a driver's vision, but also that such driver must anticipate the presence of other cars stopped upon the highway in the fog. *O'Rourke* v. *McConaughey*, (C. A. La., 1935) 157 So. 598; *Pepper* v. *Walsworth*, 6 La. App. 610, *Safety Tire Service, Inc.*, v. *Murov*, (La. App.) 140 So. 879; *F. Strauss & Son, Inc.*, v. *Childers*, (La. App.) 147 So. 536; *Penton* v. *Fisher*, (La. App.) 155 So. 135. It is again urged, as it was in the Circuit Court of Appeals, that the thin fog deceived Slade and led him to believe that he might safely proceed into the fog. The Louisiana court has held that a light fog, or a fog of varying thickness, preceding a heavy fog should constitute warning of greater danger ahead and cause a driver to take extra precautions instead of excusing a driver from driving into fog under such conditions. *Lapeze* v. *O'Keefe*, (La. App.) 158 So. 36; *Inman* v. *Silver Fleet of Memphis*, (C. A. La., 1939) 175 So. 436. The testimony in this case further shows that the shoulder of the road where the collision occurred was not prepared for traffic, but was used as a place where vehicles might park, and, therefore, Slade certainly had no reason to anticipate that the shoulder of the road would be free of obstruction and he should have governed his conduct accordingly.

Doubtless, there are many cases where the circumstances require a drawing of close distinctions and a careful study of the facts to determine whether the same comes within the general rule or within the exception to the rule. In this case, however, there were repeated warnings to the driver of the situation ahead. The fog

was visible from the elevated position on top of the Spillway for more than a half of a mile from the point of the collision. The highway was straight for several miles and any driver observing the conditions was bound to have known that his view was obstructed.

Slade was in the fortunate position of having another truck driver precede him into the fog. He was warned of the danger by Greer's blinking his lights upon entering the fog. He was also warned as to the density of the fog and the limit of his visibility upon seeing Greer's truck disappear into the fog. Only a few minutes before Slade and Greer had discussed the fact that the same truck that Greer was driving had pulled over on the shoulder of the road on the trip down from Memphis and had overturned on the highway with the same load which he then carried. Slade, therefore, was not only charged with knowledge that some truck would likely be parked upon the shoulder of the highway (*Hutchinson* v. *T. L. James & Company, Inc.*, (La. C. App., 1935) 160 So. 447), but he was bound to have anticipated that Greer's truck might overturn on the shoulder of the highway, and that, in running into the fog blindly, he took a chance upon encountering an obstruction.

The Circuit Court of Appeals referred to the force of the collision and the results thereof, as shown by the photographs, in the following language:

> "The undisputed evidence as to the force of the collision, and the photographs taken showing the condition of the trucks after the collision, established that, heavily loaded as it was, * * * Slade's truck was running much too fast for safety."

That the court was justified in reaching such a conclusion as a matter of fact is shown by the photographs before this Court, and that the court was justified in reaching such a conclusion as a matter of law is sustained by the case of *Domite* v. *Thompson*, (La. App., June 2,

1942) 9 So. 2d 55. The case of *Inman* v. *Silver Fleet of Memphis*, (La. App., 1937) 175 So. 436, presents a factual situation more nearly in point with that of the present case, than any other case that we have been able to find on this question, and in that case the court said:

> "* * * She knew that the night was misty and fog pockets were hovering over the road * * *. She had 500 feet in which to prepare for the situations which she was approaching, and the nature of which she could not determine, and yet did not take the precaution of bringing her car under proper control to meet the situation, whatever it might turn out to be, but she took a chance on the road being clear of obstructions and lost her guess."

Slade encountered almost an indentical situation, and the Circuit Court of Appeals said (R. 603):

> "* * * Slade drove into the dense fog where he could not see his own way and was the author of his own death. * * *"

It should be noted that petitioners relied upon *Futch* v. *Addison et al.*, 12 La. App. 535, 126 So. 590; *Stafford* v. *Nelson Bros.*, 15 La. App. 51, 130 So. 234, 235; *Hanno* v. *Motor Freight Lines, Inc.*, 17 La. App. 62, 134 So. 317.

Each of the above styled cases have been subsequently expressly disapproved or overruled. *O'Rourke* v. *McConaughey*, (La. C. App., 1934) 157 So. 598 (605); *Blahut* v. *McCahil*, 163 So. 195 (198).

Petitioners Have Not Been Denied Any Right under Rule 8 of the Federal Rules of Civil Procedure As Alleged under Specification Number 4.

Petitioners seek permission from this Court to be allowed to litigate again the question of Nuisance which has been finally concluded by a final judgment in the District Court in respondents' favor and from which petitioners prosecuted no appeal.

Petitioners cite Rule 8 of the Federal Rules of Civil Procedure, which contains paragraph (e) (2) in part as follows:

> "A Party may set forth two or more statements of a claim or defense alternately or hypothetically, *either* in one count or defense *or* in separate counts or defenses."

Petitioners' complaint filed in the District Court contained two counts. The first was predicated on negligence (R. 2-7); the second count was predicated on nuisance (R. 8-10). There was a jury verdict and final judgment in favor of respondents on the second count on August 14, 1941 (R. 562-563). Petitioners did not appeal from this final judgment on the second count which involved the question of nuisance.

The requirement that an appeal from a final judgment be taken within three months is mandatory. 28 U. S. C. A., Sec. 230; Federal Rules of Civil Procedure, Rule 73 (a); *Morrow et al.* v. *Wood et al.*, (C. C. A. 5th) 126 F. 2d 1021.

A judgment not appealed from is final, *Kithcart* v. *Metropolitan Life Insurance Company*, (C. C. A. Mo.), 119 F. 2d 497, cer. den. *U. S. ex rel. Kithcart* v. *Gardner*, 315 U. S. 808, 62 S. Ct. 793, 86 L. Ed. .....

This Court has repeatedly declared that an appellee may not secure any modification in his favor of a judgment unless he appeals. *Clearly* v. *Ellis Foundry Co.*, 132 U. S. 612, 10 S. Ct. 223, 33 L. Ed. 473; *Fitchie* v. *Brown*, 211 U. S. 321, 329, 29 S. Ct. 106, 53 L. Ed. 202; *Marine Transit Corp.* v. *Dreyfus*, 284 U. S. 263, 277, 52 S. Ct. 166, 76 L. Ed. 516; *Alexander* v. *Cosden Pipe Line Co.*, 290 U. S. 484, 487, 54 S. Ct. 292, 78 L. Ed. 452; *Helvering* v. *Pfeiffer*, 302 U. S. 247, 250, 58 S. Ct. 159, 82 L. Ed. 231; *Le Tulle* v. *Scofield*, 308 U. S. 415, 421, 60 S. Ct. 313, 84 L. Ed. 355.

In *Helvering* v. *Pfeiffer, supra,* this Court said:

"* * * an appellee cannot without a cross-appeal attack a judgment entered below."

In *Le Tulle* v. *Scofield, supra,* this Court said:

"A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him.

"*The Stephen Morgan,* 94 U. S. 599, 24 L. Ed. 266; *Mt. Pleasant* v. *Beckwith,* 100 U. S. 514, 527, 25 L. Ed. 699, 702; *United States* v. *Blackfeather,* 155 U. S. 180, 186, 39 L. Ed. 114, 116, 15 S. Ct. 64; *Landram* v. *Jordan,* 203 U. S. 56, 62, 41 L. Ed. 88, 90, 27 S. Ct. 17; *Bothwell* v. *United States.* 254 U. S. 231, 233, 65 L. Ed. 238, 240, 41 S. Ct. 74; *United States* v. *American R. Exp. Co.,* 265 U. S. 425, 435, 68 L. Ed. 1087, 1093, 44 S. Ct. 560; *Morley Constr. Co.* v. *Maryland Casualty Company,* 300 U. S. 185, 191, 81 L. Ed. 593, 597, 57 S. Ct. 325."

In *Reed* v. *Allen,* 286 U. S. 191, 52 S. Ct. 532, 76 L. Ed. 1054, this Court announced the applicable rule as follows:

"If respondent, in addition to appealing from the decree, had appealed from the judgment, the appellate court, having both cases before it, might have afforded a remedy. *Butler* v. *Eaton,* 141 U. S. 240, 35 L. Ed. 713, 11 S. Ct. 985. But this course respondent neglected to follow."

* * * * * * *

"Having so failed, we cannot be expected, for his sole relief, to upset the general and well established doctrine of *res judicata,* conceived in the light of the maxim that the interest of the state requires that there be an end to litigation—a maxim which comports with common sense as well as public policy. And the mischief which would follow the establishment of a precedent for so disregarding this salutary doctrine against prolonging strife would be greater

> than the benefit which would result from relieving some case of individual hardship. *United States* v. *Throckmorton*, 98 U. S. 61, 65, 68, 69, 25 L. Ed. 93, 96."

In *Baldwin* v. *Iowa State Traveling Men's Association*, 283 U. S. 522, 51 S. Ct. 517, 75 L. Ed. 1244, this Court said:

> "Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties."

The final judgment in favor of respondents on the question of nuisance in the District Court has not been assigned as error by petitioners in the Circuit Court of Appeals and cannot be the grounds for a writ of certiorari, *Sonzinsky* v. *United States*, 300 U. S. 506, 57 S. Ct. 554, 81 L. Ed. 772; *Waterloo Distilling Corporation* v. *United States*, 282 U. S. 577, 51 S. Ct. 282, 75 L. Ed. 558.

Even if petitioners had preserved this point in the record in this case by proper appeal and assignment of error, it could not be the basis for the granting of a writ of certiorari for the reason that petitioners would be confronted with concurrent findings of fact by the District Court and by the Circuit Court of Appeals, *Virginian Railroad Co.* v. *System Federation No. 40*, 300 U. S. 515, 57 S. Ct. 592, 81 L. Ed. 789; *Alabama Power Company* v. *Ickes*, 302 U. S. 464, 58 S. Ct. 300, 82 L. Ed. 374.

Specification Number 5 Is Not Well Taken for the Reasons That:

(1) There Is No Conflict Between the Louisiana Law and the Interstate Commerce Commission Safety Rules.

(2) The Motor Carrier Act of Congress Does Not Prevent the Application of Salutary Local Provisions to Promote Safety of Motor Traffic.

Petitioners take the position that there is a conflict between the Rules of the road under the Louisiana Law

and the Safety Rules and Regulations of the Interstate Commerce Commission. Petitioners allege that Rule 2.22, which prohibits parking on a highway is in conflict with the Louisiana Law, which requires a driver to stop if his vision becomes wholly obscured. The Rule referred to provides in part as follows:

> "No motor vehicle shall be stopped, parked or left standing, whether attended or unattended, upon the traveled portion of any highway outside of a business or residence district, when it is practicable to stop, park, or leave the motor vehicle off the traveled portion of such highway. * * *"

Petitioners are mistaken as to the existence of a conflict and as to the proper construction to be placed upon the above quoted rule. Rule 15 (a) of the Rules of the road of the State of Louisiana, Act No. 286 of the Louisiana Laws of 1938, contains almost the identical language and provides in part as follows:

> "No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled portion of any highway, outside of a business or residence district, when it is practicable to park or leave such vehicle standing off of the paved or improved or main traveled portion of such highway; * * *"

Where it becomes necessary under the Louisiana Law for a driver to stop momentarily because his vision has become obscured, same is not within the prohibition of the statute or the Rule.

In the case of *Hutchinson* v. *T. L. James & Company, Inc.*, (La. C. App., 1935) 160 So. 447, the court in commenting upon whether a temporary stop in a fog was in violation of Section 3, Rule 15-A, of the Louisiana Act 21 of 1932, which provides:

> "No person shall park * * * any vehicle * * * upon the paved or improved or main traveled portion of any highway."

said:

> "* * * We do not believe that the act referred to is applicable to this case because it can hardly be said that defendant's truck was 'parked' on the highway. It had simply stopped for a few seconds in order that its driver might ascertain if the road was clear for further progress. * * *"

Petitioners are also in error in alleging that the Rules and Regulations of the Interstate Commerce Commission would take precedence over the local traffic rules and regulations of the different states and localities. In *Sharp et al.* v. *Barnhart et al.*, (C. C. A. 7) 117 F. 2d 604, the court said:

> "The Motor Carrier Act of Congress does not prevent the application of the salutary local provisions to promote safety of motor traffic. In the case of *Welch Co.* v. *New Hampshire*, 306 U. S. 79, 59 S. Ct. 438, 441, 83 L. Ed. 500, the Court said:
>
> > 'The roads belong to the State. There is need of local supervision of operation of motor vehicles to prevent collisions, to safeguard pedestrians, and the like. * * * In view of the efforts of governmental authorities everywhere to mitigate the destruction of life, limb and property resulting from the use of motor vehicles, it cannot be inferred that Congress intended to supersede any state safety measure prior to the taking effect of a federal measure found suitable to put in its place. Its purpose to displace the local law must be definitely expressed.' "

This question has been decided by this Court adversely to the contentions of petitioners on several occasions. *Maurer* v. *Hamilton*, 309 U. S. 598, 60 S. Ct. 726, 84 L. Ed. 969; *Eichholz* v. *Public Service Commission of Missouri*, 306 U. S. 268, 59 S. Ct. 532, 83 L. Ed. 641; *Ziffrin, Inc.*, v. *Reeves*, 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128.

It has also been held that the Rules and Regulations of the Interstate Commerce Commission do not supercede *bona fide* traffic regulations of municipalities. *Lowe* v.

City Council of Augusta, (D. C. Ga.) 45 F. Supp. 143; *Commonwealth* v. *Kennedy,* (Pa.) 195 Atl. 770.

Petitioners Merely Ask This Court to Review the Evidence or Inferences Drawn from It, Which Does Not Warrant the Granting of the Writ.

We respectfully submit that it has been demonstrated that the Circuit Court of Appeals correctly applied the Louisiana Law to the facts presented by the record in this case. The sum and substance of the petition filed is to persuade this Court to review the evidence and such inferences as may be drawn therefrom. This Court has consistently and wisely declined to grant writs of certiorari for this purpose. *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U. S. 175, 58 S. Ct. 849, 82 L. Ed. 1273; *Egan* v. *Hart,* (La.) 165 U. S. 188, 189, 191; *People of State of Illinois* v. *Economy Light & Power Co.,* 234 U. S. 497, 519, 523.

Even if this Court disagreed with the Circuit Court of Appeals as to whether the facts presented by petitioners in the trial court were sufficient to take the case to the jury, it could not and would not settle any important principle or question of public policy. The Louisiana Law on the questions involved is clear. The application of the law to the facts in each particular case necessitates a decision on the part of the District Court originally and on the part of the Circuit Court of Appeals on appeal to determine whether the defendant is entitled to a directed verdict. The duty of determining this question rests solely on the Circuit Court of Appeals and should not be imposed upon this Court. If this court reviewed each such case in order to determine whether it was in agreement with the decision of a particular Circuit Court of Appeals, this Court would not have time for any other type of litigation, and questions of primary importance which should receive the attention of the Supreme Court of the United States would suffer.

Petitioners cite *Bailey* v. *Central Vermont Railway*, No. 640, decided May 24, 1943, 84 L. Ed. 1030, which was reviewed by this Court because it involved a construction of the Federal Employer's Liability Act. The opinion rendered by Mr. Justice Roberts in that case is particularly applicable to the case presented by this record.

This Court Need Not Examine the Grounds on Which the Circuit Court of Appeals Has Placed Correct Decision.

The conclusions reached by the Circuit Court of Appeals on the question of contributory negligence made it unnecessary for that court to pass on the question of negligence on the part of respondent and upon the question of proximate cause. These questions were expressly pretermitted. In so doing the Circuit Court of Appeals followed strictly the procedure adopted in similar cases by the Louisiana courts. *Campbell* v. *Texas & Pacific Railway Co.*, (La. App.) 182 So. 339.

The record discloses beyond question that respondent was entitled to a directed verdict under each of these points which were pretermitted. This being true, this Court will not examine the grounds on which a Circuit Court of Appeals put a correct decision. *Alpha S. S. Corp.* v. *Cain*, 281 U. S. 642, 50 S. Ct. 443, 74 L. Ed. 1086.

It Affirmatively Appears from the Record That Respondent Was Not Guilty of Any Negligence Which Contributed to the Accident.

Where the situation complained of was created by the State Highway Commission of Louisiana, on whom the Laws of Louisiana place the exclusive duty to construct and maintain the highway, the respondent, as a private property owner in a rural community, was under no duty to anticipate that the conditions so created might, during certain weather conditions, render the highway unsafe.

This case presents a situation created wholly and entirely by the Louisiana Highway Commission. Respondent had no control over the selection of the site for the highway; it had no control over the details of construction; it had no control over the decision on the part of the Louisiana Highway Commission to dredge the canal north of the highway, thereby interrupting existing drainage. The Louisiana Highway Commission had exclusive control over these acts and it is exclusively within the jurisdiction of that Commission to determine whether any given situation creates or constitutes a hazard on a public highway.

If, in fact, a dangerous situation has been created on the highway at Norco, which is denied, it has been solely brought about by the action of the Louisiana Highway Commission, over whom this respondent had no control whatever. It clearly follows that there was no duty on the part of the respondent to anticipate that the condition thus created constituted a menace or a danger to the traveling public. *Warner* v. *De Britton*, (La., 1933) 151 So. 239; *Zacharias* v. *Nesbitt*, (Minn.) 185 N. W. 205; *Chambers* v. *Whelan*, (C. C. A. 4) 44 F. 2d 340; *Rose* v. *Slough*, (N. J.) 104 Atl. 194; *Burrow* v .*St. Louis Public Service Co. et al.*, (Mo.) 100 S. W. 2d 269; *Lopes* v. *Sahuque*, (La.) 38 So. 810; *Millstead* v. *City of New Orleans*, (La.) 146 So. 492.

Petitioners wholly failed to prove the alleged negligence on the part of respondent with that *reasonable certainty* required by the Louisiana Law. *Adkins* v. *New Orleans Railway & Light Co.*, 2 La. App. 130; *Rohr* v. *New Orleans Gaslight Co.*, (S. Ct. La.) 67 So. 361; *Transportation Mutual Ins. Co.* v. *Southern Scrap Material Co.*, (S. Ct. La.) 160 So. 800; *O'Neill* v. *Hemmingway*, (La.) 3 So. 2d 210; *McGregor* v. *Saenger-Ehrlich Enterprises*, (La.) 195 So. 624; *Vanderdoes* v. *Rumore*, (La.) 2 So. 2d 284; *Bruchis et al.* v. *Victory Oil Co.*, (La.) 153 So. 828; *Regas* v. *Doublas*, (La.) 72 So. 242.

It Affirmatively Appears from the Record in This Case That the Fog Was Merely a Condition and Not the Proximate Cause of the Collision.

The question of Slade's contributory negligence and that of the proximate cause of the collision and Slade's death resulting therefrom are closely related both as to the facts involved and the question of law.

We will not repeat the statement of how the accident occurred which we have set forth in connection with the argument on contributory negligence. The record contains much testimony relative to the nature of the fog which the complainant contended was artificially created by the alleged negligence of the Shell Oil Company and was the proximate cause of Slade's driving his truck into the rear end of Greer's truck. Regardless of how the fog was created, the evidence shows without dispute that the characteristics of this fog were no different from that of a natural fog.

In Louisiana the doctrine of the "last clear chance" prevails, and, even if we should assume for the sake of argument that the fog was created artificially by some negligent act of the Shell Oil Company, it would not follow that the fog was the proximate cause of the collision resulting in Slade's death if Slade had a reasonable opportunity to avoid the collision by exercising proper precaution. Slade was under a positive duty when confronted with the fog to stop if necessary and in any event to reduce his speed where he could stop within the range of his vision. If he had performed his duty in this respect the collision would not have occurred. Under the circumstances Slade's act was the proximate cause of the collision. *O'Rourke* v. *McConaughey*, (La. App., 1934) 157 So. 598; *Pollet* v. *Robinson Lumber Co.*, 10 La. App. 760, 123 So. 155; *Woodley & Collins* v. *Schuster's Wholesale Grocery Co., Inc.*, 12 La. App. 467, 124 So. 559; *Raziano* v. *Trauth*, 15 La. App. 560, 131 So. 212, 213; *Rector* v. *Allied Van Lines*, (La. Ct. of App., July 5, 1940) 198 So.

516; *Harper* v. *Holmes,* (C. A. La., 1939) 189 So. 463; *Campbell* v. *Texas & Pacific Ry. Co.,* 132 So. 339; *Inman* v. *Silver Fleet of Memphis,* (C. A. La., 1937) 175 So. 436; Blashfield's Cyclopedia of Automobile Law and Practice, Vol. 4, p. 336; *Illinois Central Railroad Co.* v. *Oswald,* (Ill., 1930) 170 N. E. 247; *Anderson* v. *Byrd et al.,* (Neb., 1937) 275 N. W. 825; *Mitsuda* v. *Isbell et al.,* (Calif., 1925) 234 Pac. 928; *Thompson* v. *City of Houma, La.,* (La. App.) 76 F. 2d 793; *Orton* v. *Penn. R. Co.,* (C. C. A.) 7 F. 2d 36; *Western Union Telegraph Co.* v. *Stephenson,* (C. C. A.) 36 F. 2d 47; *Smith* v. *Southern R. Co.,* (C. C. A.) 53 F. 2d 186; *Brown* v. *Southern R. Co.,* (C. C. A.) 61 F. 2d 300.

We, therefore, respectfully submit that the petition for Writ of Certiorari should be denied.

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